No. 12,305

IN THE

United States Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

EDWARD M. MILLS,
Respondent.

On Petition for Review of Decisions of the Tax Court of the United States.

BRIEF FOR THE RESPONDENT.

SIGVALD NIELSON,
HARRY R. HORROW,
FRANCIS N. MARSHALL,
FRANK H. ROBERTS,
THOMAS E. HAVEN,
225 Bush Street, San Francisco 4, California,
Attorneys for Respondent.

PILLSBURY, MADISON & SUTRO,
225 Bush Street, San Francisco 4, California,
Of Counsel.

FILED

MAR 15 1950

P. O'BRIEN,

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Contents

Page

Preliminary statement 1

Statement of facts 2

Questions presented 2

Summary of argument 3

Argument 4

I. The allocation of their respective shares of community property to the taxpayer and his wife as the separate property of each in the years 1943, 1944 and 1945 did not constitute a taxable gift of the wife's share from the husband to her, within the meaning of section 1000(d) of the Internal Revenue Code.......... 4

(a) A conversion of community property into the separate property of the spouses is not a "transfer of property" 6

(b) Even if a conversion of community property into the separate property of the spouses were to be considered a transfer, it nevertheless would not be a transfer by way of gift................ 10

(c) The marital deduction provisions of the Revenue Act of 1948 do not indicate that section 1000(d) is applicable to conversions of community property 11

II. The agreement of January 1, 1939, between the taxpayer and his wife effectively caused the future earnings of the taxpayer to be one-half his separate property and one-half the separate property of his wife, so that the earnings never were community property during the taxable years in question, but were separate property when and as earned................. 15

Conclusion 23

Table of Authorities Cited

Cases

Pages

Alabama Title & Trust Co. v. Millsap, 71 F.2d 518 19

Biddle v. Commissioner of Internal Revenue, 86 F.2d 718 19
R. L. Blaffer & Co., 37 B.T.A. 851 20
Boland v. Commissioner of Internal Revenue, 118 F.2d 622 21
Brunton v. Commissioner of Internal Revenue, 42 F.2d 81 19

Chesapeake & Ohio Ry. v. Martin, 283 U.S. 209 17
Claire v. United States, 34 F.Supp. 1009 21
Edith Evelyn Clark, 47 B.T.A. 865 8
Commissioner of Internal Revenue v. Hogle, 165 F.2d 352 22

William C. de Mille Productions, Inc., 30 B.T.A. 826 20

W. S. Farish & Co., 38 B.T.A. 150 20

Gemsco, Inc. v. Walling, 324 U.S. 244 14
Mabel F. Grasselli, 7 T.C. 255 8

Hardy v. Commissioner of Internal Revenue, 125 F.2d 863 21
Helvering v. Chicago Stockyards Co., 318 U.S. 693 20
Helvering v. Hickman, 70 F.2d 985 21
Helvering v. National Grocery Co., 304 U.S. 282 20
Hogle v. Commissioner of Internal Revenue, 132 F.2d 66 22

Jordan v. Roche, 228 U.S. 436 14
Jurs v. Commissioner of Internal Revenue, 147 F.2d 805 21

Kansas City So. Ry. v. Albers Comm. Co., 223 U.S. 573 17
Koshkonong v. Burton, 104 U.S. 668 14

Levindale Lead Co. v. Coleman, 241 U.S. 432 14
Loughman v. Town of Pelham, Westchester County, N.Y., 139 F.2d 989, certiorari denied, 322 U.S. 727 15
Lucas v. Earl, 281 U.S. 111 22

Marshall v. United States, 26 F.Supp. 474, certiorari denied, 308 U.S. 597 21
Merrill v. Fahs, 324 U.S. 308 11

O'Bryan v. Commissioner of Internal Revenue, 148 F.2d 456 20

Pages

Pampanga Mills v. Trinidad, 279 U.S. 211................ 14
Penna. R. Co. v. Chamberlain, 288 U.S. 333 18
Joseph W. Powell, 34 B.T.A. 655........................ 20

Rand v. Helvering, 77 F.2d 450 20
Reynard Corporation, 37 B.T.A. 552 20
Rickenberg v. Commissioner of Internal Revenue, 177 F.2d 114, certiorari denied .... U.S. 1, 2, 3, 4, 6, 7, 9, 10, 11
Riggle v. Janss Inv. Corporation, 88 F.2d 111 19

San Francisco Ass'n for the Blind v. Industrial Aid, 152 F.2d 532 19
Schoenberg v. Commissioner of Internal Revenue, 77 F.2d 446 20
Harold F. Seymour, 27 B.T.A. 403 20
Somerville v. Commissioner of Internal Revenue, 123 F.2d 975 21
Sparkman v. Commissioner of Internal Revenue, 112 F.2d 774 21
Stone v. Stone, 136 F.2d 761 18
Stone v. United States, 164 U.S. 380 20
Suwannee Fruit & Steamship Co. v. Fleming, 160 F.2d 897 15

Texas Co. v. Hood, 161 F.2d 618, certiorari denied, 332 U.S. 829 18
Texas & New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks, 281 U.S. 548................ 20
Twentieth Century-Fox Film Corp. v. Dieckhaus, 153 F.2d 893, certiorari denied, 329 U.S. 716 17

United States v. O'Connell, 165 F.2d 697, certiorari denied, 333 U.S. 864 14
United States v. Stafoff, 260 U.S. 477 14
United States v. Washington Dehydrated Food Co., 89 F.2d 606 20

Van Dyke v. Commissioner of Internal Revenue, 120 F.2d 945 21
Van Every v. Commissioner of Internal Revenue, 108 F.2d 650, certiorari denied, 309 U.S. 689.................... 21

Statutes

Internal Revenue Code: Pages
Sec. 811(c) 5, 11
Sec. 811(d)(5) 5, 7, 8
Sec. 811(f) 9
Sec. 812(d) 9
Sec. 812(e)(2)(C)(i) 11, 12
Sec. 1000(a) 6, 7
Sec. 1000(c) 8
Sec. 1000(d) 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16
Sec. 1002 ....10, 11
Sec. 1004(a)(2) 9
Sec. 1004(a)(3)(F)(iii) 11, 12, 13

Revenue Act of 1942:
Sec. 401 5
Sec. 402(a) 5
Sec. 403(b) 9
Sec. 451 5
Sec. 452 .... 8, 9
Sec. 453 .... 5, 8

Revenue Act of 1948:
Sec. 351(a) 5

Miscellaneous

Brown and Sherman, Divisions of Community Property as Taxable Gifts (1947) 22 Calif. State Bar Journal 122.... 9

House Report No. 2333, (77th Cong. 1st Sess.) C.B. 1942-2, 372 9

Paul, Federal Estate and Gift Taxation (1946 Supp.) 210-211, 719-721 9

Senate Report No. 1631 (77th Cong. 2d Sess.) C.B. 1942-2, 504 .... 5, 9

Treasury Regulations 105, sec. 81.15 6
Treasury Regulations 108, sec. 86.2(c) 6, 15

No. 12,305

IN THE

United States Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

EDWARD M. MILLS,
Respondent.

On Petition for Review of Decisions of the Tax Court of the United States.

BRIEF FOR THE RESPONDENT.

PRELIMINARY STATEMENT.

As this Court declared in *Rickenberg v. Commissioner of Internal Revenue* (9 Cir. 1949) 177 F.2d 114, footnote on page 117, certiorari denied (Feb. 6, 1950) .... U.S. ...., this case is the gift tax corollary of that decision involving estate taxes. While there are additional sufficient reasons, discussed below, why the judgment of the Tax Court should be affirmed, the *Rickenberg* decision is decisive against the Commissioner's contentions here.

STATEMENT OF FACTS.

The statement of facts in the Commissioner's brief is sufficient except in one respect. There is nothing in the record to support the finding that the 1939 agreement did not include or relate to the future salary and earnings of the taxpayer; on the contrary, the clear and undisputed testimony requires the finding that the agreement of the parties embraced the understanding that, until changed by mutual consent, future earnings would continue to be divided equally into the separate property of each of the spouses. Our showing in this connection is in Point II, infra, pp. 15-23.

The statement and regulations involved are set out in the appendix, infra.

QUESTIONS PRESENTED.

This case presents the primary question whether the allocation of their respective shares of community property to the taxpayer and his wife as their separate property in the years 1943, 1944 and 1945 constituted a taxable gift of the wife's share from the husband to her, within the meaning of section 1000(d) of the Internal Revenue Code. This, as said above, is the precise question answered in the negative as to estate taxes by the *Rickenbery* decision.

Even if the *Rickenberg* case had been decided the other way, the question would still remain whether the agreement of January 1, 1939, between the taxpayer and his wife did not constitute one half the future earnings of the taxpayer his separate property and one half the separate property of his wife, so as to render inapplicable the sub-

sequently enacted provisions of section 1000(d). That the agreement did have this effect will be demonstrated in Point II of the argument, infra, pp. 15-23.

SUMMARY OF ARGUMENT.

I.

The conversion of the community property into the separate property of taxpayer and his wife did not result in a taxable gift under section 1000(d) of the Internal Revenue Code because, as this Court held in *Rickenberg v. Commissioner of Internal Revenue* (9 Cir. 1949) 177 F.2d 114, certiorari denied (Feb. 6, 1950) .... U.S. ...., such a conversion is not a transfer by the taxpayer of an interest which *he* owns in property but is merely an allocation to the wife of property which *she* already owns. Furthermore, nowhere in the Revenue Act of 1942 did Congress attempt to redefine the term "gift," and section 1000(d), added to the Code by that Act, applied only when there was a gift as that term was previously understood. Section 86.2(c) of Regulations 108, purporting to make such conversions taxable gifts, is invalid because nowhere in the Code is there any statutory authority for such regulation. Even if the allocation were to be considered a transfer, still it would not be a transfer by way of gift within the meaning of section 1000(d) because the release of the wife's community interest would constitute a full and adequate consideration in money or money's worth. The marital deduction provisions of the Revenue Act of 1948 do not indicate a contrary construction of the 1942 Act.

II.

The finding of the Tax Court that the agreement of January 1, 1939, between the taxpayer and his wife did not include or relate to future earnings of the taxpayer is erroneous because there is nothing in the record which would support any such finding. The Tax Court was not free to disregard arbitrarily the uncontradicted and unimpeached testimony of the taxpayer to the contrary. A proper finding in conformity with the record in this respect would support the judgment regardless of the effect of Point I, supra.

The effect of the 1939 agreement was to constitute the future earnings of the taxpayer the separate property of each spouse to the extent of one half the earnings. If the agreement did not have this effect, then there was never any conversion of community property and no tax should be imposed.

ARGUMENT.

I.

THE ALLOCATION OF THEIR RESPECTIVE SHARES OF COMMUNITY PROPERTY TO THE TAXPAYER AND HIS WIFE AS THE SEPARATE PROPERTY OF EACH IN THE YEARS 1943, 1944 AND 1945 DID NOT CONSTITUTE A TAXABLE GIFT OF THE WIFE'S SHARE FROM THE HUSBAND TO HER, WITHIN THE MEANING OF SECTION 1000(d) OF THE INTERNAL REVENUE CODE.

We submit that the correctness of this proposition already has been affirmed by this Court in *Rickenberg v. Commissioner of Internal Revenue* (9 Cir. 1949) 177 F.2d 114, certiorari denied (Feb. 6, 1950) .... U.S. ....,

wherein this Court held that the value of the wife's share upon such an allocation of community property, made in contemplation of the husband's death, could not be included in the deceased husband's gross estate because such an allocation did not constitute a transfer of property within the meaning of section 811(d)(5) of the Internal Revenue Code. Section 811(d)(5) provided that "a transfer of property held as community property by the decedent and surviving spouse * * * shall be considered to have been made by the decedent" for the purpose of section 811(c), under which property transferred in contemplation of death is includible in the gross estate of the decedent.

The question in the instant case is whether such an allocation of community property resulted in a taxable gift from the taxpayer to his wife within the meaning of section 1000(d) of the Internal Revenue Code. This section, which is the gift tax corollary to section 811(d)(5),[1] provides in part as follows:

---

[1]Section 1000(d) and section 811(d)(5) were added to the Code by the Revenue Act of 1942 and were repealed or rendered inapplicable by the Revenue Act of 1948. Section 1000(d) is applicable to gifts made between January 1, 1943, and April 2, 1948 (Revenue Act of 1942, secs. 451, 453; Revenue Act of 1948, sec. 371). Section 811(d)(5) was effective with respect to estates of decedents dying after October 21, 1942, and before January 1, 1948 (Revenue Act of 1942, secs. 401, 402(a); Revenue Act of 1948, sec. 351(a)).

That sections 1000(d) and 811(d)(5) are correlative is demonstrated by the following statement in the report of the Senate Finance Committee on the bill which became the Revenue Act of 1942 (Senate Report No. 1631, 77th Cong., 2d Sess., C.B. 1942-2, 504, 682): "Your committee has made a technical change in this section [sec. 1000(d)] in order to make its provisions correspond more closely with the estate tax amendment relating to community property."

> "All gifts of property held as community property under the law of any State * * * shall be considered to be the gifts of the husband * * *."

The Tax Court in this case held that the allocation of community property to the taxpayer and his wife as their separate property did not constitute a taxable gift within the meaning of section 1000(d) and that the contrary provisions of section 86.2(c) of Treasury Regulations 108 are an unwarranted expansion and enlargement of the meaning of section 1000(d) (Tr. 70). This Court in the *Rickenberg* case cited the Tax Court's decision in this case with approval (117 F.2d 117) and struck down the estate tax regulations (Regs. 105, sec. 81.15) which are cognate to the gift tax regulations declared invalid by the Tax Court in this case. We submit, and petitioner impliedly concedes (Petnr. Br., p. 26) that this Court's decision in the *Rickenberg* case is decisive against the Commissioner's contentions here,[2] as the following brief analysis shows.

(a) A conversion of community property into the separate property of the spouses is not a "transfer of property."

There can be no taxable gift without a transfer of property. Section 1000(a), which contains the basic definition of what is the incidence of the gift tax, specifically states that a tax "shall be imposed upon the transfer * * * of property by gift." The word "gift" in section 1000(d) is clearly controlled by the provisions of section 1000(a). Neither section 1000(d) nor any other provision of the Revenue Act of 1942 purports to modify or amplify sec-

---

[2]The Commissioner's brief in this case was filed before the denial of his petition for certiorari in the *Rickenberg* case (Petnr. Br., p. 27).

tion 1000(a). Section 1000(d) cannot apply unless there is a *transfer* of property.

The opinion of this Court in the *Rickenberg* case is conclusive that a conversion of community property into the separate property of the husband and wife does *not* involve a transfer of property. As this Court stated (177 F.2d 116-117):

> "The substance of the transaction between decedent and petitioner was that decedent relinquished his power of management and control over petitioner's share of the property. Petitioner acquired the power to manage and control her one-half and to do with it what she pleased. Decedent, likewise, acquired this same power over his one-half. *Neither decedent nor the petitioner received or gave up any property; both owned one-half before and after the agreement was executed.*
>
> * * * * * * *
>
> Since this power of management is not an interest in the property, the Commissioner and the Tax Court were in error in holding there had been a transfer of property * * *" (emphasis supplied).

The *Rickenberg* case also disposes of petitioner's assertion that sections 1000(d) and 811(d)(5) indicate a Congressional purpose to treat the spouse to whom community property was economically attributable as the owner of such community property for all gift and estate tax purposes. There is not the faintest suggestion in the language of sections 1000(d) or 811(d)(5) to support petitioner's interpretation of Congress' intent, and, as this Court stated in the *Rickenberg* case, the framework of the community property amendments of the Revenue Act of

1942 demonstrate that Congress understood that a conversion of community property was *not* a transfer of property which would bring into operation sections 1000(d) and 811(d)(5).

That Congress did not regard the term "transfer of property" to include conversions of community property is clear, also, from the 1942 gift tax amendment with respect to powers of appointment. Prior to the enactment of the Revenue Act of 1942, neither conversions of community property nor the release or exercise of powers of appointment were subject to gift tax.[3] Section 452 of that Act added section 1000(c) to the Code to specifically provide that an exercise or release of a power of appointment "*shall be deemed a transfer of property* by the individual possessing such power." Section 1000(d) immediately follows section 1000(c) in the Revenue Act of 1942. Unlike section 1000(c), however, section 1000(d) does not provide that partitions of community property shall be deemed to be transfers of community property. The conclusion is inescapable that Congress in 1942 intended *not* that conversions of community property would constitute taxable gifts but that when there *was* a gift of community property section 1000(d) would determine the person to whom such gift was taxed.[4]

---

[3]Petitioner concedes that conversions of community property prior to 1943 were not subject to gift tax (R. 50. 67), and he has acquiesced in decisions holding that the exercise of release of powers of appointment prior to the effective date of the Revenue Act of 1942 were not taxable gifts (*Edith Evelyn Clark* (1942) 47 B.T.A. 865; *Mabel F. Grasselli* (1946) 7 T.C. 255).

[4]It cannot be contended that this deliberate difference in phraseology between section 1000(c) and section 1000(d) (secs. 452 and 453 of the Revenue Act of 1942) was inadvertent, and that Congress meant the same thing in the two sections. This is apparent from

As in the *Rickenberg* case, petitioner relies heavily, with lengthy quotations (Petnr. Br., pp. 31-34), upon an elaborate theory evolved by Mr. Randolph Paul (Federal Estate and Gift Taxation, 1946 Supp., pp. 210-211, 719-721) to supply the missing congressional intent. The decision in the *Rickenberg* case, of course, disposes completely of the Paul theory, which fails to consider any of the controlling factors recognized by the court in the *Rickenberg* case and reviewed above. That the Paul theory is an irrational interpretation of the statute, as well as unsound from the revenue standpoint, is demonstrated in detail by Brown and Sherman in their article "Divisions of Community Property as Taxable Gifts" (22 Calif. State Bar Journal 122), in which the authors show from a careful analysis of the statute and legislative history that such divisions are not subject to gift tax under section 1000(d).

---

the provisions of section 403 of the Revenue Act of 1942, which amended section 811(f) of the Internal Revenue Code to provide that the value of property with respect to which the decedent has at the time of his death a power of appointment shall be included in his gross estate. Section 403(b) provided that if the power of appointment was exercised in favor of a public, charitable or religious use as specified in section 812(d) of the Code, then the exercise of the power would be considered a bequest of the decedent. A provision similar to section 403(b) was unnecessary in section 452 because the latter section specified that exercises and releases of powers of appointment were to be deemed transfers of property, and a charitable deduction with respect to transfer of property by gift already was provided in section 1004(a)(2) of the Code. Under the estate tax provisions such exercises and releases of powers of appointment are not transfers of property; because, if they were transfers, section 403(b) would be unnecessary in that under section 812(d) "The amount of all bequests, legacies, devises, or *transfers*" to public, charitable, and religious use shall be deducted from the gross estate in determining the net estate. This difference in wording is expressly recognized in the Committee Reports (House Report No. 2333, 77th Cong., 1st Sess., C.B. 1942-2, 372, 495, 496; Senate Report No. 1631, 77th Cong. 2d Sess., C.B. 1942-2, 504, 682) and hence cannot be attributed to inadvertence.

Finally, as the Tax Court pointed out, section 1000(d) is predicated upon the existence of a gift. Under its own terms it specifically relates to and is based upon "all *gifts* of property held as community property." As stated above, there is no question—and petitioner concedes (Tr. 50, 67)—that a conversion of community property prior to the enactment of section 1000(d) did not constitute a taxable gift. The Tax Court analyzed the effect of section 1000(d) with simple eloquence when it said in the instant case (Tr. 69):

> "It applies only *when* there is a gift of property. The section nowhere defines nor attempts to change or impose any new meaning of the word 'gift.' What constituted a gift before its enactment remained the same after it became law. The only change that it made in the Federal gift tax law was to decree that *when* a 'gift of community property' was made it 'shall be considered to be the gift of the husband.' "

(b) Even if a conversion of community property into the separate property of the spouses were to be considered a transfer, it nevertheless would not be a transfer by way of gift.

Section 1002, which was in no way amended or modified by section 1000(d), provides that a transfer of property is not subject to gift tax if it is made for an adequate and full consideration in money or money's worth. Even if a conversion of community property into the separate property of the spouses were to be considered a transfer of property, it could not be a taxable gift, because such transfer would be for an adequate and full consideration within the meaning of section 1002. While this Court in the *Rickenberg* case found it unnecessary to consider this question because it held that no transfer of property re-

sults from a conversion of community property, the opinion makes clear that the community property interests of the spouses are equal and existing. Therefore, if in a partition of community property, the husband were considered to have transferred property to the wife, then likewise the wife would be considered to have transferred property to the husband and the property received by each on the transfers, being equal, would constitute an adequate and full consideration in money or money's worth. This point is elaborately covered by the *amici curiae* briefs filed in the *Rickenberg* case, to which, in order to avoid repetition, we respectfully refer this Court.[5]

(c) The marital deduction provisions of the Revenue Act of 1948 do not indicate that section 1000(d) is applicable to conversions of community property.

Petitioner asserts that the marital deduction provisions of the Revenue Act of 1948 indicate that Congress regarded conversions of community property occurring during the effective period of section 1000(d) as having constituted taxable transfers under that section (App. Br., pp. 27-30).[6] He explains the *exclusion* from the estate and gift tax marital deduction bases of separate property obtained by a partition of community property occurring during 1942 or subsequent to April 2, 1948, and the *inclusion* of separate property obtained by such a partition occurring prior to April 2, 1948, except during 1942 (I.R.C., secs. 812(e)(2)(C)(i) and 1004(a)(3)(F)(iii)),

---

[5]What constitutes full and adequate consideration under section 811(c) is the same under section 1002 (*Merrill v. Fahs* (1945) 324 U.S. 308).

[6]Petitioner made the same assertion in his petition for certiorari in the *Rickenberg* case, which was denied by the Supreme Court on February 6, 1950 (........ U.S. ....).

by the theory that in the first case the partition of community property was not subject to gift tax, but that in the latter case, Congress thought that a partition of community property was taxable under section 1000(d) (App. Br., p. 29); in other words, that Congress drew the line between inclusion in and exclusion from the marital deduction bases on the basis of gift tax liability. That the congressional demarcation followed no such line is apparent from the express language of the statutes. Both sections 812(e)(2)(C)(i) and 1004(a)(3)(F)(iii) clearly provide that separate property obtained by a partition of community property occurring *prior* to 1942 —when, as petitioner concedes (supra, p. 8), *no* gift tax liability attached to a partition of community property— is *includable* in the estate and gift tax marital deduction bases. If the congressional purpose had been as petitioner asserts, then separate property obtained by a partition of community property occurring prior to 1942 would have been *excluded* from the estate and gift tax marital deduction bases. That Congress did not so provide demonstrates that petitioner's theory as to the basis of demarcation in the Revenue Act of 1948 cannot stand analysis.

Furthermore, there is nothing in the language of the Revenue Act of 1948 or in the Committee Reports on that Act to support the Commissioner's theory that Congress regarded section 1000(d) as imposing a gift tax upon a conversion of community property into separate property. Neither section 812(e)(2)(C)(i) nor section 1004 (a)(3)(F)(iii) defines a conversion of community property as a transfer of an interest in property by one spouse

to another. The language of these sections and the lack of any suggestion in the Committee Reports indicating that Congress regarded section 1000(d) as applicable to conversions of community property demonstrate that the Commissioner's theoretical implications are without foundation. Petitioner's search for statutory language to support his contention results in a misstatement of the provisions of section 1004(a)(3)(F)(iii). On pages 27 and 28 of his brief petitioner states:

> "Congress amended Section 1004 of the Code so as by Subsection (a)(3)(F)(iii) of that section to provide for the *exclusion* from the gift tax base, for the purpose of computing the marital deduction, only of conversions of community property *between the donor and the donee spouse*—mark these words—which occurred both prior to and after the period during which Section 1000(d) was effective."

The emphasis on the words "between the donor and the donee spouse" is apparently intended to suggest that these words were used by Congress with reference to a conversion of community property. The fact is, however, that section 1004(a)(3)(F)(iii) used the words "donor and the donee spouse" with reference to a gift of *separate* property from one spouse to another. A gift of separate property of course is subject to gift tax and obviously gives rise to a donor-donee relationship. Section 1004(a)(3)(F)(iii) is concerned with whether the marital deduction is applicable to such a gift. It provides that if the *separate* property which is given was previously obtained by a conversion of community property between the spouses—that is, the "donor and donee spouse"—during 1942 or subsequent to April 2, 1948, then no marital

deduction is allowable. Obviously the words "donor" and "donee" are used to describe the relationship between the spouses with respect to the gift of *separate* property and not with respect to the prior conversion of community property.

The sentence from petitioner's brief quoted above also suggests that all conversions of community property both prior to and subsequent to the effective period of section 1000(d) are excluded from the marital deduction base. We have pointed out that this is not true. Conversions of community property prior to 1942—and, obviously, prior to the effective period of section 1000(d)—are *not* excluded from the marital deduction base.

In any event, whatever theoretical implications the Commissioner may draw from the provisions of the Revenue Act of 1948, they can have no bearing upon a determination of what transactions are covered by section 1000(d). It is an established rule that subsequent legislation cannot operate by implication to change retroactively the plain meaning of a prior statute.

> *Gemsco, Inc. v. Walling* (1945) 324 U.S. 244, 265;
> *Pampanga Mills v. Trinidad* (1929) 279 U.S. 211, 218;
> *United States v. Stafoff* (1923) 260 U.S. 477, 480;
> *Levindale Lead Co. v. Coleman* (1916) 241 U.S. 432, 439;
> *Jordan v. Roche* (1913) 228 U.S. 436, 445;
> *Koshkonong v. Burton* (1881) 104 U.S. 668, 677-679;
> *United States v. O'Connell* (2 Cir. 1948) 165 F.2d 697, 699, certiorari denied (1948) 333 U.S. 864;

Suwannee Fruit & Steamship Co. v. Fleming (Emerg. Ct. of App. 1947) 160 F.2d 897, 901;

Loughman v. Town of Pelham, Westchester County, N.Y. (2 Cir. 1943) 139 F.2d 989, 993-994; cert. den. (1944) 322 U.S. 727.

For the reasons stated above, we submit that the equal allocation of community property in the years 1943, 1944 and 1945 to the taxpayer and his wife as their separate property did not constitute a taxable gift within the meaning of section 1000(d) of the Internal Revenue Code and that the provisions of section 86.2 of Treasury Regulations 108 purporting to impose a gift tax upon such a transaction are invalid as an unwarranted enlargement of the statute.

II.

THE AGREEMENT OF JANUARY 1, 1939, BETWEEN THE TAXPAYER AND HIS WIFE EFFECTIVELY CAUSED THE FUTURE EARNINGS OF THE TAXPAYER TO BE ONE-HALF HIS SEPARATE PROPERTY AND ONE-HALF THE SEPARATE PROPERTY OF HIS WIFE, SO THAT THE EARNINGS NEVER WERE COMMUNITY PROPERTY DURING THE TAXABLE YEARS IN QUESTION, BUT WERE SEPARATE PROPERTY WHEN AND AS EARNED.

As an alternative ground of supporting the judgment of the Tax Court, we submit that the court was in error when it found that the agreement of January 1, 1939, between the taxpayer and his wife did not include or relate to the future salary and earnings of the taxpayer (Tr. 62), and thus had the effect of rendering the taxpayer's earn-

ings the separate property of each spouse at the instant of acquisition.

The only evidence received in the court below, other than the stipulation of facts, was the oral testimony of the taxpayer, Mr. Mills. He testified that the terms of the oral agreement entered into on or about January 1, 1939, were that he would divide his salary and director's fees with his wife, and that one half of this compensation would be her separate property and one half would be his separate property (Tr. 33, 34). The agreement was to continue "for the rest of our lives" (Tr. 34). "It was a final settlement between us" (Tr. 37). Contrary to petitioner's allegations in his brief (pp. 12-16), there was nothing indefinite about the terms of the agreement. Quite naturally, after a lapse of over eight years, the taxpayer could not remember the exact words used. Indeed, the Tax Court might have had good reason to be suspicious if Mr. Mills had claimed to remember verbatim the conversation between his wife and himself eight years before. But there is no doubt from the testimony in the transcript as to the substance of the agreement.

Petitioner's contention that thoughts of tax consequences were the motivating force behind the decision to enter into the agreement has no merit. There is no evidence as to just how the agreement would affect Mr. Mills' tax problems, but it is certain that he was not concerned with a gift tax in the future for it was not until October 21, 1942, nearly four years after the agreement was made, that the Revenue Act of 1942, creating section 1000(d), became law.

In such a case, where the evidence is uncontradicted and the witnesses unimpeached, the court below was in error in disregarding the testimony of Mr. Mills. The rule laid down by the Supreme Court of the United States is that a trier of fact is not at liberty, under the guise of passing on the credibility of a witness, to disregard his testimony, when from no reasonable point of view it is open to doubt.

Chesapeake & Ohio Ry. v. Martin (1931) 283 U.S. 209, 214-220;

Kansas City So. Ry. v. Albers Comm. Co. (1912) 223 U.S. 573, 595, 596.

In *Twentieth Century-Fox Film Corp. v. Dieckhaus* (8 Cir. 1946) 153 F.2d 893, certiorari denied 329 U.S. 716, the plaintiff-appellee alleged that the appellant had plagiarized her unpublished book and had used it in a very successful motion picture. The district court found for the plaintiff after comparing her book with the picture, although appellant had introduced testimony to the effect that there was no copying of the plaintiff's book nor even any access thereto. The Eighth Circuit Court of Appeals reversed, holding flatly that the district court was not free to disregard this uncontradicted direct testimony, saying (pp. 899-900):

> "Although our circuit has not had occasion to declare the law in cases involving plagiarism, it is thoroughly committed upon mature consideration to the doctrine that the law does not permit the oath of credible witnesses testifying to matters within their knowledge to be disregarded because of suspicion that they may be lying. There must be impeachment of such witness or substantial contradiction, or, if the circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point.

The most that can be claimed for the result of the comparison between the book and the picture in this case is that it raises a doubt or suspicion that defendant might have had access. The suspicion cannot stand against the oaths of the witnesses who know the facts. We denied power in the fact finding body to find in disregard of this settled law. American Smelting & R. Co. v. National Labor Relations Board, 8 Cir., 126 F.2d 680, loc.cit. 688. See also Chesapeake & O. R. Co. v. Martin, 283 U.S. 209, 216, 217, 51 S.Ct. 453, 75 L.Ed. 983; Cf. Massachusetts Protective Assn. v. Mouber, 8 Cir., 110 F.2d 203, 206, 207."

As shown by that case, the rule goes even to the extent that inferences from circumstantial evidence may not be drawn where they conflict with uncontradicted and unimpeached testimony:

Penna. R. Co. v. Chamberlain (1933) 288 U.S. 333, 340, 341;

Texas Co. v. Hood (5 Cir. 1947) 161 F.2d 618, 620, certiorari denied 332 U.S. 829.

In *Stone v. Stone* (App. D.C. 1943) 136 F.2d 761, the plaintiff's testimony was uncontradicted, unimpeached and not inherently improbable. In reversing the court below for finding contrary to this testimony, the Court of Appeals for the District of Columbia said (p. 764):

"In this case there was positive testimony, uncontradicted, and not inherently improbable. Neither a jury nor a judge is at liberty to disregard such evidence. '* * * where the testimony is all one way, and is not immaterial, irrelevant, improbable, inconsistent, contradicted, or discredited, such testimony cannot be disregarded or ignored by judge or jury, and if one or the other makes a finding which is contrary to

such evidence, or which is not supported by it, an error results, for which the verdict or decision, if reviewable, must be set aside. To hold otherwise would vest triers of the facts in cases subject to review with authority to disregard the rules of evidence which safeguard the liberty and estate of the citizen. Kelly v. Jackson, 6 Pet. 622, 631, 8 L.Ed. 523.' "

See also:

San Francisco Ass'n for the Blind v. Industrial Aid (8 Cir. 1946) 152 F.2d 532;

Riggle v. Janss Inv. Corporation (9 Cir. 1937) 88 F.2d 111, 116;

Biddle v. Commissioner of Internal Revenue (2 Cir. 1936) 86 F.2d 718;

Alabama Title & Trust Co. v. Millsap (5 Cir. 1934) 71 F.2d 518, 520.

Since the terms of the agreement described by the taxpayer are nowhere contradicted, and the record is clear that the agreement was conscientiously performed as made (Stip. par. 7, 8; R. 45-48), the petitioner's suggestion that it may have been motivated by thoughts of tax consequences is irrelevant. The question is *what* was done, not *why* it was done, and we have completely answered the question by showing the terms and performance of the agreement. As this Court said in one of the cases upon which the Commissioner relies, *Brunton v. Commissioner of Internal Revenue* (9 Cir. 1930) 42 F.2d 81, 82:

> "It is to be conceded that the contract is not to be deemed ineffectual merely because the purpose of the decedent may have been to avoid the heavier tax rate of 1921" (citations omitted).

Consequently, the rule that the Court is not bound by an interested party's declaration of purpose is inapplicable, and, likewise, the cases cited by petitioner on pages 14 and 15 have no application to the instant case.[7]

This Court has repeatedly held that under California law an agreement between a husband and wife changing the status of community property to separate property has the effect of rendering future earnings of the spouses separate property from the instant of acquisition. The earnings in such a case never become community property.

> *O'Bryan v. Commissioner of Internal Revenue* (9 Cir. 1945) 148 F.2d 456, 458;

---

[7]*Helvering v. National Grocery Co.* (1938) 304 U.S. 282; *Helvering v. Chicago Stockyards Co.* (1943) 318 U.S. 693; *William C. de Mille Productions, Inc.* (1934) 30 B.T.A. 826; *Reynard Corporation* (1938) 37 B.T.A. 552; *R. L. Blaffer & Co.* (1938) 37 B.T.A. 851; and *W. S. Farish & Co.* (1938) 38 B.T.A. 150, concerned the surtax on corporations improperly accumulating surplus, now section 102 of the International Revenue Code. In such cases the motive for accumulating the surplus is made by statute a critical factor in determining whether the tax shall be imposed. *Schoenberg v. Commissioner of Internal Revenue* (8 Cir. 1935) 77 F.2d 446; *Rand v. Helvering* (8 Cir. 1935) 77 F.2d 450; *Harold F. Seymour* (1932) 27 B.T.A. 403; *Joseph W. Powell* (1936) 34 B.T.A. 655, were cases involving "wash sales," in which the nature of the transaction is inherently suspicious and the taxpayer's purpose for that reason is a critical factor in determining the true substance of the transaction. Furthermore, in the *Rand* case, supra, the uncontradicted evidence was so highly improbable that the court was not required to give it any weight. *Texas & New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks* (1930) 281 U.S. 548, was a labor case, in which motive is material to determine the question of good faith. *United States v. Washington Dehydrated Food Co.* (8 Cir. 1937) 89 F.2d 606, was a case of conflicting testimony where the Government contended the finding was against the weight of the evidence, which is not a reviewable error. In *Stone v. United States* (1896) 164 U.S. 380, the transcript of the evidence was not before the Court, so that it could not review the sufficiency of the evidence.

Jurs v. Commissioner of Internal Revenue (9 Cir. 1945) 147 F.2d 805, 810;

Hardy v. Commissioner of Internal Revenue (9 Cir. 1942) 125 F.2d 863;

Sommerville v. Commissioner of Internal Revenue (9 Cir. 1941) 123 F.2d 975;

Van Dyke v. Commissioner of Internal Revenue (9 Cir. 1941) 120 F.2d 945, 947;

Boland v. Commissioner of Internal Revenue (9 Cir. 1941) 118 F.2d 622, 624;

Sparkman v. Commissioner of Internal Revenue (9 Cir. 1940) 112 F.2d 774, 776, 777;

Van Every v. Commissioner of Internal Revenue (9 Cir. 1940) 108 F.2d 650, certiorari denied 309 U.S. 689;

Helvering v. Hickman (9 Cir. 1934) 70 F.2d 985.

The Court of Claims also has laid down the rule that an agreement between the spouses changing the status of their future earnings from community to separate property will be given effect for tax purposes.

Claire v. United States (Ct.Cl. 1940) 34 F.Supp. 1009, 1013;

Marshall v. United States (Ct.Cl. 1939) 26 F.Supp. 474, 479, certiorari denied 308 U.S. 597.

Thus the effect of the agreement between the taxpayer and his wife on January 1, 1939, was to constitute one half the earnings of the taxpayer the separate property of his wife, and those earnings never became, even for an instant, community property.

The fact that the source of the income was the earnings of the taxpayer does not require the conclusion that he made a taxable gift in the years in question.

> Cf. *Commissioner of Internal Revenue v. Hogle* (10 Cir. 1947) 165 F.2d 352.

In the *Hogle* case the taxpayer was the settlor and trustee of a trust of the Clifford type, and the Tenth Circuit Court of Appeals had previously determined that the income from the trust resulting from trading in securities and commodities under the taxpayer's direction was taxable to the settlor because it was within his power to control the extent of such trading and therefore the amount of income (*Hogle v. Commissioner of Internal Revenue* (10 Cir. 1942) 132 F.2d 66). Nevertheless, in the second *Hogle* case, wherein the Commissioner sought to impose a gift tax on the income received by the beneficiaries the Court held that no gift tax was payable because there was no transfer of any property to the beneficiaries by the settlor. The trust was irrevocable, and no right to alter or amend was retained. Hence, the beneficiaries had an absolute right to the income, not dependent upon any act of the settlor. There was no transfer directly or indirectly from the settlor to the trust of the income from the securities.

The analogy between the second *Hogle* case, 165 F.2d 352, and the instant case is clear. The effect of the 1939 agreement between the taxpayer and his wife was to render one half of his future earnings her separate property. Nothing he could do, once the income was earned, could divest her of her interest.

The contention of the Commissioner that the principle of *Lucas v. Earl* (1930) 281 U.S. 111, requires the im-

position of the gift tax misses the point. If one half the earnings of the husband are the separate property of the wife, this must be so because of the 1939 agreement. The mere fact that checks were deposited in the wife's account would not make the money any less community property. The only evidence of any agreement to change the character of the property is that of the 1939 agreement, testified to by the taxpayer. If the taxpayer's earnings did not become separate property by virtue of that agreement, they did not become separate property at all, and if they did not become separate property, no gift tax can possibly be due.

CONCLUSION.

For the reasons stated above the decisions of the Tax Court should be affirmed.

March 15, 1950.

Respectfully submitted,

SIGVALD NIELSON,

HARRY R. HORROW,

FRANCIS N. MARSHALL,

FRANK H. ROBERTS,

THOMAS E. HAVEN,

Attorneys for Respondent.

PILLSBURY, MADISON & SUTRO,

Of Counsel.

(Appendix Follows.)

Appendix

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(d) *Revocable Transfers*—

* * * * *

(5) [added by Section 402(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. *Transfers of Community Property in Contemplation of Death, etc.*—For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse under the laws of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.

f(1) In General.—To the extent of any property (A) with respect to which the decedent has at the time of his death a power of appointment, or (B) with respect to which he has at any time exercised or re-

leased a power of appointment in contemplation of death, or (C) with respect to which he has at any time exercised or released a power of appointment by a disposition intended to take effect in possession or enjoyment at or after his death, or by a disposition under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

(26 U.S.C. 1946 ed., Sec. 811.)

Sec. 1000. Imposition of Tax.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. Gift taxes for the calendar years 1932-1939, inclusive, shall not be affected by the provisions of this chapter, but shall remain subject to the applicable provisions of the Revenue Act of 1932, except as such provisions are modified by legislation enacted subsequent to the Revenue Act of 1932.

* * * * *

(c) Powers of Appointment.—An exercise or release of a power of appointment shall be deemed a transfer

of property by the individual possessing such power. For the purposes of this subsection the term "power of appointment" means any power to appoint exercisable by an individual either alone or in conjunction with any person, except—

(1) a power to appoint within a class which does not include any others than the spouse of such individual, spouse of the creator of the power, descendants of such individual or his spouse, descendants (other than such individual) of the creator of the power or his spouse, spouses of such descendants, donees described in section 1004(a)(2), and donees described in section 1004(b). As used in this paragraph, the term "descendant" includes adopted and illegitimate descendants, and the term "spouse" includes former spouse; and

(2) a power to appoint within a restricted class if such individual did not receive any beneficial interest, vested or contingent, in the property from the creator of the power or thereafter acquire any such interest, and if the power is not exercisable to any extent for the benefit of such individual, his estate, his creditors, or the creditors of his estate.

If a power to appoint is exercised by creating another power to appoint, such first power shall not be considered excepted under paragraph (1) or (2) from the definition of power of appointment to the extent of the value of the property subject to such second power to appoint. For the purposes of the preceding sentence the value of the property subject to such second power

to appoint shall be its value unreduced by any precedent or subsequent interest not subject to such power to appoint.

(d) [as added by Section 453 of the Revenue Act of 1942, *supra*]. *Community Property.*—All gifts of property held as community property, under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife.

* * * * *

(26 U.S.C. 1946 ed., Sec. 1000.)

SEC. 1002. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

(26 U.S.C. 1946 ed., Sec. 1002.)

Revenue Act of 1948, c. 168, 62 Stat. 110:

SEC. 361. MARITAL DEDUCTION.

(a) Section 812 of the Internal Revenue Code (relating to deductions in computing net estate in the case of a citizen or resident of the United States) is hereby amended by adding at the end thereof a new subsection to read as follows:

"(e) *Bequests, Etc., To Surviving Spouse.*—

"(1) *Allowance of Marital Deduction.*—

"(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

* * * * *

"(2) *Computation of Adjusted Gross Estate.*—

* * * * *

"(C) *Same—Conversion Into Separate Property.*—

"(i) If during the calendar year 1942 or after the date of the enactment of the Revenue Act of 1948, property held as such community property (unless considered by reason of subparagraph (B) of this paragraph as not so held) was by the decedent and the surviving spouse converted, by one transaction or a series of transactions, into separate property of the decedent and his spouse (including any form or co-ownership by them), the separate property so acquired by the decedent and any property acquired at any time

by the decedent in exchange therefor (by one exchange or a series of exchanges) shall, for the purposes of clauses (i), (ii), and (iii) of subparagraph (B), be considered as 'held as such community property'.

*   *   *   *   *

(26 U.S.C. 1946 ed., Supp. II, Sec. 812.)

Sec. 371. Gifts of Community Property.

Section 1000 (d) of the Internal Revenue Code (relating to gifts of property held as community property) is amended by adding at the end thereof a new sentence to read as follows: "This subsection shall be applicable only to gifts made after the calendar year 1942 and on or before the date of the enactment of the Revenue Act of 1948."

(26 U.S.C. 1946 ed., Supp. II, Sec. 1000.)

Sec. 372. Marital Deduction.

Section 1004 (a) of the Internal Revenue Code (relating to deductions in computing net gifts in the case of a citizen or resident of the United States) is hereby amended by adding at the end thereof a new paragraph to read as follows:

"(3) *Gift to Spouse.*—

"(A) *In General.*—Where the donor transfers during the calendar year (and after the date of the enactment of the Revenue Act of 1948) by gift an interest in property to a donee who at the time of the

gift is the donor's spouse—an amount with respect to such interest equal to one-half of its value.

* * * * *

"(F) *Community Property.*—

"(i) A deduction otherwise allowable under this paragraph shall be allowed only to the extent that the transfer can be shown to represent a gift of property which is not, at the time of the gift, held as community property under the law of any State, Territory, or possession of the United States, or of any foreign country.

"(ii) For the purposes of clause (i), community property (except property which is considered as community property solely by reason of the provisions of clause (iii) shall not be considered as 'held as community property' if the entire value of such property (and not merely one-half thereof) is treated as the amount of the gift.

"(iii) If during the calendar year 1942 or after the date of the enactment of the Revenue Act of 1948, property held as such community property (unless considered by reason of clause (ii) as not so held) was by the donor and the donee spouse converted, by one transaction or a series of transactions, into separate property of the donor and such spouse (including any form of co-ownership by them), the separate property so acquired by the donor and any property acquired at any time by the donor in exchange therefor (by one exchange or a series of exchanges) shall, for the purposes of

clause (i), be considered as 'held as community property'.

*   *   *   *   *

(26 U.S.C. 1946 ed., Supp. II, Sec. 1004.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

Sec. 81.15 [as amended by T.D. 5239, 1943 Cum. Bull. 1081, 1084] *Transfers during life.*— * * *

In the case of estates of decedents dying after October 21, 1942, a transfer to a third party or third parties of property held as community property by the decedent and spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered, in accordance with section 811 (d)(5), as added by section 402(a) of the Revenue Act of 1942, for the purposes of this section and sections 81.16 through 81.21, inclusive, to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the spouse or derived originally from such compensation or from separate property of the spouse. The same statutory provisions apply in the case of a division of such community property between the decedent and spouse into separate property, and in the case of a transfer of any part of the community property into separate property of such spouse; in such cases, the value of the property which becomes the separate property of such spouse, with the exception stated in the preceding sentence, shall be included in the gross estate of the decedent

under section 811 (c) or section 811 (d), if the other conditions of taxability under such sections exist. If in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse is transferred to themselves as joint tenants or as tenants by the entirety, the transfer is taxable under section 811(c), except with respect to such part of the property so transferred as is attributable to the spouse under the exception stated in the first sentence of this paragraph. With respect to the meaning of property derived originally from such compensation or from separate property of the spouse and to the identification required, see section 81.23.

Treasury Regulations 108, promulgated under the Internal Revenue Code:

SEC. 86.2 *Transfers Reached.*— * * *

* * * * *

(c) *Transfers of community property after 1942.*— During the calendar year 1943 and any calendar year thereafter any gift of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country constitutes a gift of the husband for the purpose of the gift tax statute (regardless of whether under the terms of the transfer the husband alone or the wife alone is designated as the donor or whether both are so designated as donors), except to the extent that such property is shown (1) to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation, or (2) to

have been derived originally from separate property of the wife. The entire property comprising the gift is prima facie a gift of the husband, but any portion thereof which is shown to be economically attributable to the wife as prescribed in the preceding sentence constitutes a gift of the wife.

The rule stated in the preceding paragraph applies alike to a transfer by way of gift of community property to a third party or third parties, to a division of such community property between husband and wife into the separate property of each, and to a transfer by the husband and wife of any part of such community property into the separate property either of the husband or of the wife, or into a joint estate or tenancy by the entirety of both spouses. In all of such cases the value of the property so transferred or so divided, as the case may be, is a gift by the husband to the extent that it exceeds the aggregate amount of the value of that portion which is shown to be economically attributable to the wife, as prescribed in the preceding paragraph, and of the value of the husband's interest in such property after such transfer or division. The value of the property so transferred or so divided, as the case may be, is a gift by the wife to the extent that the portion of such value which is shown to be economically attributable to her, as prescribed in the preceding paragraph, exceeds the value of her interest in such property after such transfer or division. See examples (5) and (6) of subsection (a) of this section. No gift tax results from a transfer on or after January 1, 1943, of

separate property of either spouse into community property.

Property derived originally from compensation for personal services actually rendered by the wife or from separate property of the wife includes property that may be identified as (1) income yielded by property received as such compensation or by such separate property, and (2) property clearly traceable (by reason of acquisition in exchange, or other derivation) to property received as such compensation, to such separate property, or to such income. The rule established by this statute for apportioning the respective contributions of the spouses is applicable regardless of varying local rules of apportionment, and State presumptions are not operative against the Commissioner.